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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL DIAZ III,

Defendant and Appellant.

C080816

(Super. Ct. No. 12F6114)

A jury found defendant Michael Diaz III guilty of counts including attempted murder and street terrorism, along with gang, recidivist, and other enhancements. Defendant was sentenced to 43 years 4 months in prison.

On appeal, defendant raises nine contentions. He challenges the admission of certain evidence: (1) testimony that Norteños are trained to kill prison guards, along with a demonstration of body armor vulnerabilities; (2) the use of certain PowerPoint slides during a gang expert's testimony; (3) the use of defendant's jail booking statements related to his Norteño affiliation; and (4) the reference to a report on defendant's jail conduct. Defendant also contends (5) the gang enhancements and street terrorism charge

were not proved; (6) the trial court erred in failing to discharge a juror who had, after jury deliberations commenced, been approached outside the courthouse by a heavily tattooed Hispanic man who said, “good morning” to her; (7) the errors were cumulatively prejudicial; (8) remand is appropriate in light of Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2) (SB 1393); and (9) a one-year prison prior enhancement must be stricken.

Defendant’s fifth, eighth, and ninth contentions have merit. We reverse the street terrorism conviction. We also remand to allow the trial court to consider exercising its discretion to strike or dismiss the serious felony prior conviction under SB 1393, and if the court declines to do so, we order that the prior prison term for the same conviction must be stricken. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the early morning of August 25, 2012, defendant stabbed the two victims. The two victims later testified that defendant had attacked them, mistaking them for members of a rival white supremacist gang. Defendant maintained the victims attacked him, and he stabbed them in self-defense. He also maintained he was not, then, an active Norteño.

The Prosecution’s Evidence

The First Victim’s Testimony

The first victim testified that before the stabbing, he and the second victim had gone to a neighbor’s home. Ten minutes after arriving, they were approached by two men he didn’t know. The men, defendant and Pena, saw a tattoo on the first victim’s shirtless back. Defendant repeatedly asked the first victim why his shirt was off, whether he’d been to prison, and if he was a Peckerwood. Pena laughed at the Peckerwood comment, egging defendant on. The first victim did not describe what he meant by egging defendant on, but said Pena also engaged in what the first victim called “mockery and sarcasm.”

The first victim told defendant and Pena he had never been to prison and the tattoo wasn’t gang related. Defendant said something to the effect of, “Oh, yeah, really?”

Feeling threatened, and that defendant and “his buddy . . . were trying to start stuff,” the victims left to go home and play basketball. But they did not go far; the first victim’s home was about 80 feet from where the initial encounter occurred.

Around midnight, the victims were playing basketball in front of the first victim’s house. As they were talking to two women sitting on the curb, Pena approached and wrapped his arms around both victims’ shoulders in a friendly manner. Defendant then crept up from behind and stabbed the first victim, cutting him down the back. The victim turned and punched defendant.

The second victim “stepped up” to defendant and was stabbed in the stomach. The first victim tried to intervene, and defendant repeatedly stabbed him under his arm.¹ Defendant then ran away. The victims went to a neighbor’s house and 911 was called.

At trial, the first victim denied being a Peckerwood or having any gang tattoos.

The Second Victim’s Testimony²

The second victim provided similar testimony. In the evening leading up to the stabbing, he and the first victim went to the neighbor’s home. There, they saw defendant and Pena. The second victim knew Pena from high school but did not know defendant.

Defendant and Pena told the victims to put their shirts on and harassed them over the first victim’s tattoo. The second victim testified that the first victim had “complete sleeves,” and “I think that guy misinterpreted it and thought we were gang members or something.”

The first victim said, “Leave me the fuck alone,” but they were continually harassed until they left for a nearby house and “did some more drinking.”

¹ At trial, the prosecutor had the first victim show his scar to the jury, which went “from under [his] armpit all the way down to . . . [his] shoulder wing behind [his] back.”

² At the second day of his testimony, the second victim refused to show up and a body attachment order was issued.

Approximately 1:00 o'clock in the morning, the victims were hanging out by their basketball hoop with two girls, when Pena grabbed them both and said, "what's going on, guys." Defendant then cut the first victim: "He sliced him down the back." The second victim rushed defendant and was stabbed in the abdomen.³ The first victim was then stabbed under his armpit. During the attack, neither defendant nor Pena said anything.

On cross-examination, the second victim admitted he often wrote "W.P." on Facebook posts, which he begrudgingly conceded could mean "white power." He would also write "wetback," and other racist terms. He had a Facebook photo of him holding a dog and performing a Hitler salute, with the caption "White fuckin' power even the dog recognizes." He also had a picture of a swastika in his window captioned: "I've lived in the same house for 10 years with a big red swastika in the window. I don't talk shit. So, find and we'll settle this."

Defendant's Arrest and Police Interview

A detective, who was called to the scene that morning, testified that he found defendant asleep on the grass of a nearby school.⁴ Defendant had a red bandana hanging from his back pocket and a knife. He had no visible injuries or scrapes and when asked about injuries, he said he had a cut on his finger but complained of no other injuries. He looked hungover.

Once arrested, defendant asked what he was being arrested for. He was told he would be informed of the charges at the station. Defendant spontaneously asked, "Is it for murder?" When told the police were investigating an attempted homicide, defendant

³ The second victim testified he had to pick up his "intestines and my fat tissue and everything . . . and put it in my stomach."

⁴ When found, defendant had a striped shirt over his head, and he was wearing a tank top underneath. The record discloses no evidence defendant displayed his own tattoos before or during the attack.

asked, “Is it for double murder?” Again, he was told the officers were investigating an attempted homicide. Defendant responded, “Damn, double murder.”

When the detective interviewed defendant, defendant denied any memory of the night before. He also denied being at the neighbor’s house. Defendant, however, told the detective he was an “old gangster,” said he knew what Peckerwoods were, and referred to Sureños as cockroaches.

The detective saw numerous Norteño related tattoos on defendant. He had a Huelga bird tattoo, a symbol adopted by the Nuestra Familia. He had a north star rising tattoo, which could indicate a Norteño leadership position. He had the word “Norte” on his back, a term synonymous with Norteño. He also had the number 14 in roman numerals, which is common for Norteños. Defendant’s red bandana was a color associated with Norteños.

The Gang Expert’s Testimony

The prosecution called a special agent with the California Special Service Unit to testify as a gang expert. The expert provided background information on the Norteño gang, and explained the bomber–stabber tactic, whereby a “bomber” distracts the victim, while the stabber carries out the assault. He also explained that publicly showing gang tattoos, or “flying colors,” in the presence of a rival gang member can be seen as a sign of disrespect. A Norteño would feel obligated to challenge such disrespect with violence. And acts of retribution benefit the gang by enhancing the gang’s violent reputation to enemies.

The expert opined that defendant was an active Norteño the day of the stabbing, and the stabbing was committed to benefit the Norteño street gang.

The Defense Evidence

Defendant’s Testimony

Defendant denied being an active Norteño at the time of the stabbing. But he conceded he had been a Norteño since he was a child, and his tattoos are Norteño. He,

however, dropped out in 2007, and as he explained, once you drop out, you can't go back in.⁵

As to the stabbing, defendant testified he had been at the neighbor's house for a half-hour before the victims arrived. Defendant and Pena were standing in the driveway when the victims walked up, and the first victim said, "What the fuck you lookin' at?" The victims looked drunk, and defendant had never met them before.

Pena responded: "Who the fuck are you talking to?" The first victim shot back: "I'm talking to you, you fucking wetbacks." For about two minutes, the victims screamed, "get the fuck out of here," "white power," and go back to Mexico. The victims then left.

Defendant and Pena stayed at the house. Several hours later, the victims returned. Defendant saw both victims and another man standing on the sidewalk in front of the neighbor's house. The first victim said, "What's up, you fucking wetbacks?" The second victim echoed the insult. The third man called defendant and Pena "fucking pussies." The three men then charged forward.

Pena rushed to meet them, saying "Get the fuck out of here." The first victim punched Pena, knocking him unconscious. Defendant then pushed the first victim away from Pena. The first victim punched defendant in the mouth, and the second victim kicked him in the side, sending defendant to the ground.

With defendant on his back, both victims stood over him throwing punches. Defendant drew and unfolded the pocketknife latched to his pocket. Defendant testified that, fearing for his life, he "[i]n one motion" stabbed both victims.⁶

⁵ The expert had been asked about a 2007 prison memorandum stating that defendant was disassociating from the Norteños. The expert stated the gang experts at the prison found the memo credible "at the time."

⁶ Defendant's testimony about the location where this occurred conflicted with the testimony of a responding officer who testified to following the victim's blood trail from

The victims then ran away. Defendant picked up Pena and walked him back to the house. Defendant then left in a panic.

As to the red bandana in his back pocket, defendant testified it was his but denied he was showing it or that it was sticking out.⁷ As to why he did not mention the alleged attack by the victims to the detective, he explained: “I kind of grew up don’t say nothing, that kind of attitude.”

On cross-examination, defendant denied ever seeing the tattoo on the first victim’s back. But he admitted he knew Pena was a Norteño the day of the stabbing. He admitted he knew what a bomber–stabber is. He admitted that flashing a rival gang tattoo is a sign of disrespect, and Norteños are trained not to accept such disrespect. And he admitted he had had a jail fight with a Southerner while he was in jail pending trial on the instant charges.

The Prosecution’s Rebuttal Evidence - Gang Expert Testimony Concerning the Stabbing

The gang expert testified on rebuttal that Norteños are trained to attack vulnerabilities in prison guard body armor, which does not protect armpits or below the beltline. The expert opined that stabbing a perceived rival in the armpit and lower abdomen was consistent with Norteño tactics taught in prison. He also testified that active Norteños would not openly socialize with a Norteño drop-out.

where the police found the victims to the middle of an intersection in the neighborhood. In closing, defense counsel conceded, “the stabbing didn’t actually occur where [defendant] thought it was near [the neighbor’s].” Counsel explained, “To me, that actually goes to his honesty. This is how I recall it. He knows that’s not where the blood trail starts but says, I recall it being more up here.”

⁷ Defendant maintained the police had pulled the bandana out of his pocket so it could be photographed.

Verdict and Sentencing

The jury found defendant guilty of all charges: two counts of attempted murder (counts 1 & 2), two counts of assault with a deadly weapon (counts 3 & 4), two counts of battery with serious bodily injury (counts 5 & 6), and one count of street terrorism (count 7). It also found numerous enhancements true, including as to the attempted murder counts, gang enhancements (Pen. Code §§ 186.22, subd. (b)(1)(B) & (b)(1)(C))⁸, and a deadly weapon use enhancement. It also found a great bodily injury enhancement as to count 1.⁹

The trial court found defendant had suffered a prior strike, as well as a prior serious felony (§ 667, subd. (a)(1)) and a prior prison term (§ 667.5, subd. (b)) based on a 2004 conviction for domestic violence with great bodily injury. It also found defendant had suffered a prior prison term based on a 2005 conviction for possessing a controlled substance.

The trial court imposed a 43-year 4-month aggregate term, calculated as follows: for count 1 (first victim), a 14-year term (the middle term doubled for the strike) along with a 10-year gang enhancement, a three-year great bodily injury enhancement, and a one-year deadly weapon enhancement; for count two (second victim), a four-year eight-month term (one-third the middle term, doubled for the strike) along with a three-year four-month term for the gang enhancement (one-third the term), and a four-month term for the deadly weapon enhancement (one-third the term); and a five-year prior serious

⁸ Undesignated statutory references are to the Penal Code.

⁹ Great bodily injury was not alleged as to the second victim. Only the first victim's name was mentioned in the great bodily injury allegations.

felony enhancement and two one-year prior prison term enhancements.¹⁰ For the remaining counts and enhancements, terms were imposed and stayed under section 654.

DISCUSSION

For several of defendant's evidentiary challenges, no objection was raised in the trial court. This effects a forfeiture. (See Evid. Code, § 353 [an objection to the admission of evidence must be timely and clearly specify the basis of the objection]; *People v. Doolin* (2009) 45 Cal.4th 390, 448.)

On defendant's request, we will nevertheless review those forfeited contentions as claims of ineffective assistance of counsel. As such, defendant must show (1) his trial counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms," and (2) he was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674, 693-694, 696] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*).)

I. Norteño Training Concerning Killing Prison Guards and Body Armor Demonstration

Defendant challenges the gang expert's testimony that Norteños are trained to kill prison guards and the demonstration of body armor vulnerabilities. We find no error.

A. Additional Background

In the prosecution's case-in-chief, the gang expert testified that Norteños are "trained extensively in the human body and how to inflict the greatest amount of injury during a violent attack." Norteños use weapons and target vital areas, including under the arm, back of the body, and the abdomen.

Later when defendant testified, the prosecutor asked if he knew that correctional officers wore body armor, which does not protect armpits or waists. Defense counsel

¹⁰ As discussed in part IX *post*, only one prior prison term enhancement should have been imposed.

objected on relevance grounds, and two unreported sidebar discussions were held. Defendant subsequently testified, “Well, it protects their stomach and the waist, sir.” Later the court explained that it had allowed the prosecution to establish that prison guard armor does not protect armpits and below the waistline, adding: “I thought that that was relevant to motivation as to where the stab wounds occurred in this case.”

On rebuttal, the gang expert testified that in prison, guards wear “stab-resistant” body armor. Wearing actual body armor, the expert showed the jury how the armor did not protect armpits or below the belt line. The prosecutor asked, “[a]re gang members trained to attack correctional officers wearing such vests?” The expert said yes, adding that that included Norteños. The expert also opined that a Norteño gang member stabbing someone under the armpit or in the lower abdomen is consistent with their tactical experience and training.

On cross-examination, the expert agreed that someone who received this kind of training might revert to it when under the stress of an attack.

B. Analysis

On appeal, defendant contends the detective’s testimony and body armor demonstration was irrelevant, misleading, and highly inflammatory in that it lacked any tendency in reason to prove or disprove a material disputed fact. He argues the only inference to be drawn from it was defendant was trained to, and had a propensity to, kill prison guards. We disagree.

The People respond that this challenge is forfeited for failure to object. We conclude defense counsel’s objection sufficed to preserve the challenge, particularly given the trial court’s subsequent explanation that the evidence was relevant to defendant’s motivation as to where the wounds occurred. (See *People v. Memory* (2010) 182 Cal.App.4th 835, 857 [continuous objections are not required to preserve the issue for appeal].) Nevertheless, the contention fails on its merits.

The evidence was relevant and properly admitted. Unless excluded by statute or state Constitution, “all relevant evidence is admissible.” (Evid. Code, § 351; *People v. Howard* (2010) 51 Cal.4th 15, 31.) “Evidence is relevant if it ‘ha[s] any tendency in reason to prove or disprove any disputed fact.’” (*Howard*, at p. 31.) And “[t]he trial court has broad latitude in determining relevance.” (*Ibid.*) We review such determinations for abuse of discretion, finding abuse only “where a court acts unreasonably given the circumstances presented by the particular case before it.” (*Ibid.*, *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 502-503.)

Here, the evidence went to a disputed issue. The prosecution’s theory was that, using prison tactics, defendant stabbed the victims while his accomplice distracted them. Defendant maintained he was attacked and “[i]n one motion” stabbed both victims in self-defense. Accordingly, evidence that defendant was trained in prison to attack certain areas, unprotected by body armor, had some tendency in reason to support the prosecution’s theory and undermine defendant’s claim of self-defense, particularly given the parts of the body defendant targeted.¹¹

For the same reason, the evidence was not unduly inflammatory; it went to the heart of the dispute, and it was no more inflammatory than other evidence pertaining to the circumstances of the offense. Indeed, no Evidence Code section 352 objection was raised.

Thus, the trial court acted within its discretion in determining the evidence was relevant.

¹¹ While defense counsel elicited that defendant might have reverted to his training under the stress of being attacked, that would go to the weight of the evidence, not its admissibility.

II. The PowerPoint Slides Used by the Gang Expert

Defendant next challenges the use of certain slides during the gang expert's testimony. Though he concedes the presentation of gang evidence through PowerPoint slides is proper, he takes exception to certain slides: (A) a slide titled "section 186.22(f)", giving the statutory definition of a criminal street gang; (B) a slide titled "Criminal Activity" listing the predicate offenses in section 186.22; (C) a slide depicting numerous prison-made knives seized in prison; and (D) slides titled "Written Material" showing an excerpt from a prison writing, and "Targets of attack for a removal" showing a diagram of a body indicating vital areas to attack.

At trial, defense counsel objected to the PowerPoint presentation as hearsay and argued that it contained "things" not relevant to defendant's case. The prosecutor responded that nothing in the slides was overly inflammatory. The trial court allowed the jury to see the slides during the expert's testimony but did not admit them into evidence.

A. The "Section 186.22(f)" Slide

As to the slide displaying section 186.22's definition of a criminal street gang, defendant, citing *People v. Torres* (1995) 33 Cal.App.4th 37 (*Torres*), argues it was impermissible as it is the court's role to instruct the jury. We disagree.

An expert may offer an opinion as to an ultimate issue. (Evid. Code § 805.) Where an expert offers the jury a permissible opinion — such as whether a group is a criminal street gang under California law — and the jury is tasked with assessing the basis of the expert's opinion, we see nothing improper in showing the jury a slide with the relevant statutory language upon which the expert relies.

Moreover, *Torres, supra*, 33 Cal.App.4th 37, cited as an example by defendant, has no bearing on gang expert opinion testimony regarding an organization's status as a criminal street gang. In *Torres*, an officer testified that the defendant's conduct constituted a robbery and not extortion. (*Id.* at p. 44.) In doing so, the officer was permitted to express an opinion as to the definition of robbery and extortion: "My

definition of robbery is” (*Ibid.*) Relying on pre-Evidence Code caselaw, mostly from the late 1800’s, the *Torres* court held that “it is for the court to instruct the jury as to what constitutes an offense, not the witness.” (*Id.* at p. 46.)

Here, by contrast, the expert offered an opinion as to whether an organization is a criminal street gang. In doing so, the expert relied on the statutory definition. Under Evidence Code section 801, expert opinion testimony may be “[b]ased on matter . . . of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert] testimony relates” (*Id.*, subd. (b).) The statutory definition is unquestionably the starting point for an opinion about whether an organization is a criminal street gang. And the year after *Torres* was published our high court made clear that, based on Evidence Code provisions, expert opinion testimony is permissible as to elements of the gang enhancement, including whether the organization meets the definition of a criminal street gang. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 619-620, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).)

B. The “Criminal Activity” Slide

The criminal activity slide listed the predicate offenses enumerated in section 186.22, subdivision (e). It also included two rudimentary illustrations: a stick-figure-like drawing of someone pointing a gun at someone with their hands up, and what appears to be a chalk outline of a body. As to the enumerated list, defendant maintains it erroneously included “cold wheel drive-by shooting” as a predicate offense. As to the illustrations, he argues they exceeded the scope of the expert’s testimony and contained inherently prejudicial images with no connection to this case. We find no error requiring reversal.

As to the enumerated offenses, the copy of the slide in the record includes the text “ ‘Drive by’ Shooting” — not “cold wheel drive-by shooting.” The reporter’s transcript, however, reflects the expert testifying to “cold wheel drive-by shooting” as a predicate

offense.¹² Whether “cold wheel” was a malapropism or transcription error, nothing in the record suggests any resulting prejudicial error.

As to the illustrations, the challenge is forfeited for failure to specifically object to them below. (Evid. Code, § 353) Considered under the lens of ineffective assistance of counsel, no prejudice can be shown. (See *People v. Holt* (1997) 15 Cal.4th 619, 703 [“ ‘ “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies” ’ ”].) We struggle to see how these two rudimentary illustrations of generic crime would tilt the outcome. Again, to show prejudice, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, he would have received a more favorable result. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218.) “It is not enough ‘to show that the errors had some conceivable effect on the outcome of the proceeding.’ ” (*Harrington v. Richter* (2011) 562 U.S. 86, 104 [178 L.Ed.2d 624, 642] (*Richter*).) Defendant fails to establish prejudice.

C. The Images of Prison-made Knives

As to the slide showing several photos of prison-made knives or “shanks” seized in prison defendant argues the slide was irrelevant and much more provocative than the knife he used. Further the slide and others, misled the jury into associating defendant with the enumerated offenses and weapons in the photos.

Again, this challenge is forfeited by the failure to object below. And though the slide was objectionable, defendant has made no showing of prejudice. Given the nature

¹² The expert testified, “these crimes include 33 criminal offenses including witness intimidation, homicide, robbery, car jacking, assault with a deadly weapon, shooting at an inhabited dwelling, mayhem, kidnapping, car theft, criminal threats, burglary, and then the — the *cold wheel drive-by shooting*.” (Italics added) No further mention of “cold wheel drive-by shooting” was made.

of the offense, the testimony describing the gruesome attack, and the admissible background evidence regarding Norteño training and tactics, showing the jury a slide of photos of prison-made knives had no reasonable probability of affecting the outcome.

D. The “Written Material” and “Targets of Attack for a Removal” Slides

The “Written Material” slide showed an excerpt of a prison writing captioned “House hold [sic] Functions and Activities” and “Security.” The excerpt referred to establishing “squads” to act as “our first line of defense until we are able to build sufficient manpower on both yards.” It required *Soldados* (soldiers) to carry weapons and to use those weapons for “removals” and group attacks. The expert testified he “found these in the California Correctional Center in Susanville” He later explained he had seen that writing “many times and have caught that identical kite many times, . . . and it’s given to everyone in good standing who is accepted as a squad member within the Norteños.” The expert also showed a “Targets of attack for a removal” slide, showing a body diagram indicating six areas to attack.

Defendant argues the slides were irrelevant, had authentication problems, were hearsay, and violated his right of confrontation. He argues there was no evidence he was a squad member, and the slides pertained only to prison. He also argues the slides were case-specific hearsay in violation of *Sanchez, supra*, 63 Cal.4th 665. We disagree.

Defendant did not object on the grounds of authentication, nor did he raise a specific relevance objection to these slides. Regarding defendant’s claim of ineffective assistance, counsel lacked cause to object as to relevance or authenticity. The slides were relevant to the existence of a criminal street gang and the fact that members are indeed given training on areas of the body to inflict stab wounds.¹³

¹³ Defendant argues the diagram is irrelevant because neither victim was stabbed in any of the six target areas depicted on the diagram. The diagram, however, shows that gang members are trained on areas of the body to inflict stab wounds, and since the diagram

The slides' authenticity was shown by the expert who testified that he found the writings, that he has seen the same writing many times, and that such kites are given to every Norteño in good standing serving as squad members. Also the slides themselves were largely self-authenticating. (See *People v. Landry* (2016) 2 Cal.5th 52, 87 [“ ‘ “[a]s long as the evidence would support a finding of authenticity, the writing is admissible.” ’ ”].) Furthermore, an authentication objection may have worked to elicit further damaging background information and thus counsel may well have made a tactical choice not to object. (See *Richter, supra*, 562 U.S. at p. 105 [“Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence’ ”].)

As to the hearsay and confrontation challenge, the claim lacks merit because even if the slides contained hearsay, the information was not case-specific. “Case specific facts” are “those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Sanchez, supra*, 63 Cal.4th at p. 676.) Non-case-specific hearsay, by contrast, concerns general background information relating to the culture and the operations of a specific gang and may be testified to by an expert. (*Id.* at p. 685.) Indeed, expert testimony of background information “has never been subject to exclusion as hearsay, even though offered for its truth.” (*Ibid.*)

Defendant, undeterred, argues the slides were case-specific because they formed a basis for the expert’s opinion that defendant used a bomber–stabber tactic on the victims. Not so. The fact that non-case-specific hearsay informs an expert’s opinion in a particular case does not make the hearsay case specific. Indeed, under that reasoning,

relates to “removal” — and according to the expert, removal means a “coordinated attack on an enemy,” not a hit on a correctional officer — we do not view the diagram as contradicting the expert’s testimony.

any non-case-specific background hearsay could become case-specific if so relied on by an expert. We reject such a conclusion.

In sum, the challenges to the slides are either without merit or non-prejudicial.

III. Jail Booking Evidence

Defendant next challenges the admission of evidence concerning his statements during jail booking related to his Norteño affiliation. We find no error requiring reversal.

A. Additional Background

During the prosecution's case-in-chief, the gang expert opined that the day of the stabbing defendant was an active Norteño. He based that opinion on defendant's tattoos, his red bandana, his reference to Sureños as cockroaches, his jail behavior, and the fact that in jail he asked to be housed with Norteños. The expert explained that when defendant was booked into jail, he asked to be housed with Norteños.¹⁴ Defense counsel later stipulated to the admission of a copy of defendant's booking classification form reflecting that he answered "Norteño" when asked about gang affiliations and when asked about enemies, he said, "Just can't be with Southerners."

Defendant later testified that he answered Norteño because his tattoos would have created problems if he was housed with Sureños. And he did not want to be housed in protective custody along with sex offenders and child abusers.

B. Analysis

As defendant tacitly concedes, his trial counsel did not object to the gang expert's testimony. *People v. Elizalde* (2015) 61 Cal.4th 523, 540-541, decided two months before defendant's trial, held that while a jail may properly ask arrestees about gang

¹⁴ On defense counsel's prompting, the court ruled: "It is coming in to support his opinion, and it is not for the truth of the matter asserted." The trial court, however, did not explain to the jury what this meant or expressly give the jury a limiting instruction.

affiliation at booking, an unadmonished answer regarding gang affiliation is inadmissible at a subsequent trial. Accordingly, an objection may have been meritorious.¹⁵

Nevertheless, defendant has failed to establish prejudice under *Strickland*. (See *People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008–1009 [“the *Strickland* ‘reasonable probability’ standard applies to the evaluation of a Sixth Amendment claim of ineffective assistance of counsel, even when defense counsel’s alleged error involves the failure to preserve the defendant’s federal constitutional rights”].) Defendant’s booking statement went to whether he was an active Norteño the day of the stabbing. While his booking statement bolstered the case that he was, ample additional evidence also established defendant’s gang affiliation. Defendant had numerous Norteño tattoos. And while those tattoos are not inconsistent with his testimony that he was no longer a Norteño, the fact that he carried a red bandana during the incident — which was found hanging from his back pocket — and the fact that he knew Pena was a Norteño severely undermines defendant’s credibility on this point. So too does the fact that he told detectives he was an old gangster and called Sureños cockroaches. Further the nature and circumstances of the offense evinced his Norteño status. Defendant harassed the victims over a tattoo, asked about gang affiliations, and told the victims to put on shirts, which was consistent with expert testimony as to how Norteños respond to a perceived rival publicly flying colors.

Against that evidence, defendant’s jail admission was merely cumulative. It is not reasonably probable that defendant would have received a more favorable result had counsel objected and the reference to his booking statements been precluded.

¹⁵ The People argue, on appeal, that prior to his booking admission, defendant had been advised of and waived his *Miranda* rights in his interview with the detective and thus, *Elizalde* is inapplicable. This was not fully developed by the prosecution in the trial court. Given that the record sheds little light on the circumstances of the booking interview and any intervening events, we will assume without deciding that in defendant’s case a reminder or readmonishment was required.

IV. Defendant's Jail Behavior

Defendant next challenges the gang expert's testimony regarding a report on defendant's jail behavior prepared by a Detective Smetak. We find no error requiring reversal.

A. Additional Background

When the gang expert opined that defendant was an active Norteño during the stabbing, he made mention of defendant's "behavior after the crime in the county jail." When the prosecutor asked what he meant, the expert explained, "I read information developed from a detective in an interview." The prosecutor then went on to ask about defendant's jail booking statement concerning his gang affiliation discussed *ante*. No further mention of defendant's "behavior" by the detective was made on direct examination.

But on cross-examination, after the expert again referenced defendant's "behavior at the jail," defense counsel asked, "What was that behavior?" The expert answered, "establishing a household within the Shasta County Jail and setting forth the rules of the Nuestra Familia within that area." Counsel then asked, "do you have evidence that [defendant] specifically did that or are you just telling us that that's what they're expected to do." The expert responded that he had read an "informational report" prepared by a "Detective Smetak" that identified defendant doing those things. No objection was made.

The defense later called a Detective Smetak who testified to a 2011 incident, involving the first victim. Neither party asked about the jail behavior described in Smetak's report and no further mention of the report was made.

B. Analysis

The People concede the Smetak report was case-specific hearsay, prohibited by *Sanchez*, and thus, should have been barred under state law. But the People maintain defendant's Sixth Amendment right to confront witnesses was not infringed because (1)

the record is not sufficiently developed to conclude the report was testimonial and (2) Detective Smetak testified and was available for examination regarding his report.

Defendant replies that nothing in the record establishes that the Detective Smetak, who the defense called, was the same Smetak who wrote the report. And assuming it was the same Smetak, because *Sanchez* was not yet decided, defense counsel had no cause to question him about the report.

We agree the Smetak report was case-specific hearsay. As to the whether the report is testimonial, we will assume without deciding it was. We therefore turn to prejudice.

Assuming the *Sanchez* challenge is preserved and defense counsel did not forfeit the contention or act unreasonably under prevailing standards of professional norms by asking about the details of the report on cross-examination, we conclude the reference to the Smetak report, that defendant was establishing a Norteño household in jail, was harmless beyond a reasonable doubt. (See *Sanchez, supra*, 63 Cal.4th at pp. 685, 699 [improper admission of evidence in violation of the confrontation clause reviewed for prejudice using the harmless beyond a reasonable doubt standard].) Here, again, the report went to whether defendant was an active Norteño, and as discussed, abundant evidence supported that finding.

Furthermore, overwhelming evidence supported the finding that the stabbing was done to benefit a gang.¹⁶ The expert explained that Norteños will challenge and respond with violence when a perceived enemy publicly flies colors in their presence. Both victims testified that defendant fixated on the first victim's tattoo, asking if he was a Peckerwood and had been to prison, and insisting that the victims put on shirts. Defendant and Pena, a Norteño according to defendant's own testimony, later attacked in

¹⁶ The same is not true of the street terrorism charge (§ 186.22, subd. (a)) discussed in Section V, *post*.

a manner consistent with Norteño training. And in the immediate aftermath, a red bandana was found hanging from defendant's back pocket.

Concomitantly, defendant's explanation for the stabbing defied credulity. He claimed to have stabbed both victims in one motion, yet the victims testified to three discrete injuries, with the first victim showing the jury a scar going "from under [his] armpit all the way down to . . . [his] shoulder wing behind [his] back." Defendant claimed he had been punched and kicked but told a detective he had no injuries save to his finger, and the detective saw no other injuries. And defendant claimed he was attacked near the neighbor's driveway, but blood trails put the stabbing in the location where the victims said they had been attacked.

In sum, any error associated with the expert testifying to the contents of the Smetak report was harmless beyond a reasonable doubt.

V. Section 1118.1 Motion - Gang Enhancements and Street Terrorism Charge

Defendant next contends neither the street terrorism charge (§186.22, subd. (a)), nor the gang enhancements (§ 186.22, subds. (b)(1)(B) & (b)(1)(C)) were proved beyond a reasonable doubt at the close of the prosecution's case-in-chief. He notes that for street terrorism, two gang members must have committed the offense. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1132 [street terrorism requires the criminal conduct be committed by two or more gang members, which can include the defendant].) And, he argues no evidence showed he or Pena were active Norteños. As to the gang enhancements, he argues that when the assertedly objectionable evidence discussed *ante* is discarded, insufficient evidence supported the finding that he was acting on a gang's behalf.

We agree that when the prosecution's case-in-chief concluded, insufficient evidence supported the substantive gang offense charged in count 7, because up to that point, no evidence of Pena's gang membership had been presented. However, there was sufficient evidence to support the gang enhancement allegation.

A. Additional Background

After the prosecution's case-in-chief, defendant moved for judgment of acquittal (§ 1118.1) on the gang charge and enhancements, arguing no evidence established Pena was a gang member. The trial court denied the motion concluding the expert's testimony that defendant and Pena were acting as "bomber and stabber" was sufficient circumstantial evidence that Pena was a gang member.

B. Analysis

In reviewing a motion for judgment of acquittal, we apply the same standard that applies to a sufficiency of the evidence challenge. (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) We review the record as it stood when the motion was made and determine whether it, along with reasonable inferences, offers substantial evidence of the charged offense. (*Ibid.*; *People v. Houston* (2012) 54 Cal.4th 1186, 1215.) Substantial evidence is evidence that is " "reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' ' ' (*Houston*, at p. 1215.)

Here, prior to the motion, substantial evidence had been presented that defendant committed the crime to benefit a street gang. The victims' testimony indicated defendant had perceived them as rival gang members. The expert testified to Norteño behavior and tactics vis-à-vis perceived rivals, which was consistent with the attack. Defendant was found with gang indicia in the form of the visible red bandana dangling from his pocket, and later made statements suggesting hostility toward Norteño rivals. That evidence and accompanying reasonable inferences constitutes substantial evidence to support the gang enhancement.¹⁷

¹⁷ Additionally, as defendant recognizes, gang membership is not an element of the gang enhancement. (*People v. Valdez* (2012) 55 Cal.4th 82, 132., citing *People v. Valdez* (1997) 58 Cal.App.4th 494, 505 ["gang membership is not an element; nor does one need

But the same cannot be said for the finding that Pena was a Norteño for purposes of the substantive gang offense. Prior to the motion, no evidence was offered that Pena was a Norteño. The second victim went to high school with Pena but said nothing of gang affiliations. The first victim did not know Pena. When the prosecutor asked the expert's opinion on whether the crime benefited a street gang, the prosecutor asked the expert to assume the crime was committed with a "documented Norteño," but no such evidence had been presented then or before the prosecution rested its case-in-chief. Indeed, the prosecution never mentioned Pena's name during its examination of the gang expert.¹⁸ As such, the motion for judgment of acquittal should have been granted. (See *People v. Rodriguez, supra*, 55 Cal.4th at p. 1132.)

The People, however, argue that defendant's testimony that Pena was a Norteño and the crime's circumstances showed Pena was an active participant; the People note the testimony of a single witness is sufficient to prove any fact. We agree that defendant's testimony concerning Pena's gang membership was part of the overwhelming evidence ultimately supporting the jury's gang enhancement finding. But that testimony does not affect the section 1118.1 analysis as to the street terrorism charge. Defendant's testimony came after the section 1118.1 motion and thus, has no bearing on the challenge.

And the circumstances of the offense, as established by the evidence at the time of the motion, fail to give rise to substantial evidence that Pena was a Norteño gang member. Pena participated in the harassment, laughing, egging defendant on, and engaging in "mockery and sarcasm." But there is no evidence Pena said anything gang-

to be a gang member or associate to commit an act for the benefit of, in association with, or at the direction of a street gang"].)

¹⁸ The person who was with defendant was variously referred to in the prosecutor's hypothetical as a "documented Norteño," "documented companion," and "Norteño companion" even though there was no evidence showing the gang membership of defendant's companion.

related, wore gang colors, or had gang tattoos. And while Pena putting his arms around the victims before the stabbing was unquestionably suspicious, it does not establish that Pena did so because he was a Norteño — he might have acted on defendant’s suggestion or copied something he had seen before. We are simply not convinced there was substantial evidence that Pena was a Norteño gang member at the time of defendant’s section 1118.1 motion for judgment of acquittal. (See *People v. Redmond* (1969) 71 Cal.2d 745, 755 [“Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact”].)

We therefore reverse the conviction for street terrorism (§ 186.22, subd. (a)).

VI. The Refusal to Discharge a Juror

Defendant next challenges the trial court’s refusal to discharge a juror who encountered a tattooed man outside the courthouse. We find no error.

A. Additional Background

After the case had been submitted for the jury’s deliberations, a juror told the bailiff about a man she saw outside the courthouse. The man appeared Hispanic, wore a sleeveless T-shirt, and had many tattoos — including a Huelga bird tattoo. The man had said, “good morning” to the juror.

Outside the jurors’ presence, defense counsel noted that it had been determined that the man was at the court to pay traffic tickets. The trial court noted he had seen the man at the courthouse that morning and “didn’t think anything of it.” Thereafter, the trial court discussed the encounter with the juror outside the presence of the other jurors.

The court asked what the man had said to her, and the juror explained: “it wasn’t what he said. It was just the direction. He came from the courthouse just straight to me, right in front of me.” She thought he was deliberately singling her out. The man came within three feet of her, the juror stopped, and the man moved out of the way. He said, “Good morning.” She responded in kind, and he went on. She described the man as “all tattooed up.” She was not wearing a juror badge at the time.

The juror explained: “I just thought it was strange how he kind of like beelined to me and stood straight in front of me when everybody else was there . . . it was the way he looked at me and the way he said, Good morning. It felt intimidating to me.”

The court told the juror the man had business at the court. It then asked if her deliberations would be affected. She said no, and confirmed she could put it out of her mind, and had told no other jurors about it. The court instructed her not to tell the other jurors and let her return to the jury room.

Outside the juror’s presence, the court reflected: “[The juror] was obviously upset. . . . Tears were in her eyes. She used Kleenex to wipe the tears away from her eyes. She was obviously shaken; however, I do believe her statement that this is not going to affect her deliberations.” Defense counsel asked that she be excused, stating, “she was so upset, she could not even verbalize an answer and kind of nodded after trying to speak” and “she obviously on some level feels it has something to do with this case; otherwise she wouldn’t be so upset.”

The trial court denied the request, recalling the juror’s assurance it would not affect her and that she was told the man had business at the court. The court also postulated that the juror may have been upset by the process of telling the bailiff and being examined by the court and found that it was speculation as to what upset the juror.

The court nevertheless added, “if I was a Norteño and I knew that one of my soldiers was on trial, I may very well take it upon myself to do something that would cause intimidation.” Over defense counsel’s objection, the court ordered the jury escorted to lunch by marshals.¹⁹ It explained, “I think there’s sufficient grounds . . . on

¹⁹ Defendant argues that the trial court ordered that the jury be escorted “at all times.” He is mistaken. Although, the court initially suggested the jurors would be escorted “wherever they go,” ultimately the court’s oral order was limited to escorting them to and from lunch. The clerk’s minute order reflected this limitation, noting: “The court had previously ordered, on the record, that the jury be kept together by having the Marshall’s

the basis of the conduct that she described to suggest that there is at least a possibility that there is or will be or has been an attempt to influence the jury. I don't think that it took or I don't think it was effective, but I want to guard against the possibility that it might occur." The court added, "the jury is not going to know that they're being treated differently." A verdict was returned later that afternoon.

B. Analysis

On appeal, defendant argues the trial court erred in not discharging the juror because she was exposed to events outside the trial that suggested the possibility of gang intimidation. He maintains that the incident was likely to have influenced the juror and created bias against him. He also argues that ordering the jury escorted undermined any reassurances the juror had been given and signaled to jurors that legitimate safety concerns existed. We disagree.

The trial court, having observed demeanor and verbal response is best positioned to determine a juror's true state of mind. (*People v. Clark* (2011) 52 Cal.4th 856, 895.) When a juror repeatedly and unequivocally asserts that her ability to deliberate impartially is not affected by a threat, the trial court may rely on that representation in determining whether the juror can maintain impartiality after an incident raising a suspicion of prejudice. (*People v. Harris* (2008) 43 Cal.4th 1269, 1304.)

Further, a trial court may order a juror discharged if it finds good cause that the juror is unable to perform her duty. (§ 1089.) Such decisions are reviewed for abuse of discretion. (*People v. Perez* (2018) 4 Cal.5th 421, 446.) Before we " 'will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be

service escort them to a nearby restaurant for lunch. [¶] The court now modifies that order, ex parte, by directing that lunch be ordered in advance and delivered to the jury in the jury room." A separate minute order dated the same date reads: "The Court *orders* that the jurors are to remain together for lunch, with law enforcement present and that the County of Shasta shall pay for the lunch." A later entry on the same minute order reads: "The jury is provided lunch and elects to remain in the jury room for the time being."

shown by the record to be a “demonstrable reality.” ’ ’ (*People v. Jablonski* (2006) 37 Cal.4th 774, 807.) Demonstrable reality is a less deferential standard than substantial evidence. (*Perez*, at p. 446.)

Here, the juror unequivocally stated the event would not affect her deliberations. Nothing in the record gives us cause to second guess the trial court’s determination of the juror’s veracity. Indeed, the trial court questioned the juror, explained that the tattooed man had business at the court, and observed the juror’s demeanor and response.

That the trial court subsequently ordered the jury escorted to lunch raises the possibility that jurors might have felt concerned for safety, except the record does not demonstrate that the jurors were actually escorted anywhere. Nor does defendant point to anywhere in the record indicating that any of the jurors were told they might be escorted. Lunch was provided to the jurors in the jury room. (See fn. 22, *ante*.) After lunch, the clerk’s minute order reads: “The jury exits the jury room for recess until 1:00 p.m. Bailiff Smith patrols the hallway.” At 1:00 p.m., the jurors resumed their deliberations, and at 2:21 p.m., the jury reached verdicts. In any event, whatever security was provided by the marshals, there is nothing in the record showing that any juror was unable to perform the functions as a juror.

The trial court acted within its discretion in not discharging the juror.

VII. Cumulative Error

Defendant next maintains the errors cumulatively require reversal. (See *In re Avena* (1996) 12 Cal.4th 694, 772 fn. 32 [“Under the ‘cumulative error’ doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial”].) We disagree that any errors here had any such cumulative effect.

The errors we have found non-prejudicial or harmless pertained to the admission of certain images in PowerPoint slides, defendant’s jail booking statement, and the Smetak report that defendant was establishing a Norteño household in jail. But as we have explained, when that evidence is disregarded, there remains ample evidence that

defendant was an active Norteño, that he did not act in self-defense, and that he stabbed the victims to benefit a street gang. Therefore, the errors cumulatively do not require reversal. (See *People v. Martinez* (2003) 31 Cal.4th 673, 704 [“as we have seen, no serious errors occurred that, whether viewed individually or in combination, could possibly have affected the jury’s verdict”]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1009 [“Defendant was entitled to a fair trial but not a perfect one”].)

VIII. SB 1393

In supplemental briefs, the parties agree remand is required to allow the trial court to consider exercising its newly authorized discretion afforded under SB 1393. SB 1393 authorizes a trial court to strike or dismiss a section 667, subdivision (a) prior serious felony enhancement. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) It applies retroactively where a defendant’s sentence is not yet final. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

We agree with the parties that remand is appropriate so the trial court may consider exercising its authority under SB 1393.

IX. The 2004 Prior Prison Term Enhancement

Defendant contends one of his prior prison term enhancements must be struck. The People agreed in their original respondent’s brief, and so do we, assuming the trial court does not strike or dismiss the section 667, subdivision (a) prior serious felony enhancement.

Following the jury verdicts, the trial court found true the prior prison term enhancement allegation (§ 667.5, subd. (b)) related to a 2005 drug possession conviction. It also found true the prior prison term allegation and prior serious felony allegation (§ 667, subd. (a)(1)), for a 2004 conviction for domestic violence with great bodily injury.

At sentencing, the court imposed, for the 2005 conviction, a one-year prison prior enhancement. For the 2004 conviction, it imposed both a five-year prior serious felony

enhancement and a one-year prison prior enhancement. This was error. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1150 [“when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply”].)

If the trial court does not strike or dismiss the five-year section 667, subdivision (a) prior serious felony conviction enhancement related to the 2004 conviction under S.B. 1393, it must strike the prior prison term enhancement for that conviction.

DISPOSITION

The conviction for street terrorism (§ 186.22, subd. (a); count 7) is reversed.

The cause is remanded so the trial court may consider exercising its discretion to strike or dismiss the 2004 section 667, subdivision (a) prior serious felony conviction under SB 1393. If the court declines to strike or dismiss the 2004 prior serious felony conviction, it must strike the prior prison term enhancement associated with that conviction.

In all other respects, the judgment is affirmed.

/s/
MURRAY, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
HOCH, J.